

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY , THE 1ST OCTOBER 2007 / 9TH ASWINA 1929

SA.No. 168 of 1994(C)

**AS.158/1990 of SUB COURT, PAYYANNUR
OS.84/1988 of MUNSIFF COURT, PAYYANNUR**
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APPELLANT/APPELLANT/ PLAINTIFF

**MATHRADAN PALORA VEETIL
KARTHIYAYANI AMMA,
D/O. MADHAVI AMMA, RESIDING IN
KUNHIMANGALAM AMSOM, EDANAD DESOM,
KANNUR TALUK, KANNUR DISTRICT.**

**BY ADV. SRI.O.RAMACHANDRAN NAMBIAR
SRI.B.JAYAPARAKASH**

RESPONDENTS: REPENDENTS/ DEFENDANTS

- 1. PILACKA NARAYANAI, W/O. LATE
MATHRADAN PALORA VEETIL
RAGHAVAN, RESIDING IN KUNHIMANGALAM
AMSOM, DESOM (EDANAD), KANNUR TALUK
KANNUR DISTRICT.**
- 2. RAMESHAN, S/O. PILACKA NARAYANI,
RESIDING IN KUNHIMANGALAM AMSOM
& EDANAD DESOM, KANNUR TALUK,
KANNUR DISTRICT.**
- 3. DHANANJAYAN, S/O. PILACKA NARAYANI,
RESIDING IN DO.**
- 4. SATHIAN, S/O. PILACKA NARAYANI,
RESIDING IN DO.**

BY ADV. SRI.K.V.SOHAN

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 01/10/2007 , THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

S.A. NO. 168/1994

ORDER ON CMP. NO.1095/2001 IN SA. 168/1994

DISMISSED

01.10.2007

SD/- M.SASIDHARAN NAMBIAR, JUDGE

/TRUE COPY/

P.A. TO JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 168 OF 1994
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DATED THIS THE 1st DAY OF OCTOBER, 2007

JUDGMENT

Plaintiff in O.S.84 of 1988 on the file of Munsiff Court, Payyannur is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for declaration that respondents have no right to use the way through the plaint schedule property and for a consequential decree for permanent prohibitory injunction. Plaint schedule property admittedly belongs to the appellant and the property to its south belongs to respondents. Both the properties were divided and allotted under Ext.A1 partition deed dated 10.10.1966. Ext.A1 provides that there exists a way through B schedule property therein from item No.1 of A schedule property and the allottee of A schedule is entitled to use that way and the allottee of B schedule is not entitled to obstruct that right. Property of respondents is A schedule property therein and the property of the appellant is B schedule property through which the way runs towards west. Appellant in the suit contended that after death of Narayani Amma, to whom A schedule property was allotted, it devolved on the wife and children of her son Raghavan and though Ext.A1

provides a way through the plaint schedule property, subsequently a road came into existence on the northern side of the property of appellant and respondents and respondents are using the said road and they have no necessity to go through the property of appellant and therefore the right of way provided under Ext.A1 became extinct. As respondents are claiming a right, appellant sought a declaration that respondents have no right of way and also permanent prohibitory injunction restraining them from using the way.

2. Respondents in the written statement contended that the property which lies to the east of the plaint schedule property was allotted to Narayani Amma under Ext.A1 partition deed and as per the gift deed executed by Narayani Amma respondents are the owners of the property and the way to the said property is through B schedule property in Ext.A1 partition deed and respondents are residing in the old Tarawad house in the A schedule property of Ext.A1 partition deed and on the western side of the property is the plaint schedule property and the way to A schedule property is through that property and it leads to the nearby Kannangat Bhagavathi temple and the temple tank and it is having a width of 5 feet and appellant is not

entitled to dispute the right of way or obstruct the right to use the way and therefore the suit is to be dismissed.

3. On the evidence of Pws 1 and 2, Exts.A1 and C1 and C2, learned Munsiff found that Ext.A1 grants a way to the A schedule property now belonging to respondents through the B schedule property which is the plaint schedule property of appellant and it is a right of easement by grant and availability of an alternative way will not destroy the right of easement by grant. It was therefore held that appellant is not entitled to the decree sought for. The suit was dismissed.

4. Appellant challenged the decree and judgment before Sub Court, Payyannur in A.S.158 of 1990. Learned Sub Judge, on reappreciation of evidence, rejected the contention of appellant that the right of way provided is not a right of easement by grant but a right of easement by necessity. Holding that right of easement by grant will not be lost by the subsequent formation of the road on the northern side, it was held that the right of way provided under Ext.A1 is not extinct and appellant is not entitled to the decree sought for.

5. The second appeal was admitted formulating the following substantial questions of law.

1)Whether the right of way provided under Ext.A1 is a right of way as provided under Section 13(b) of Indian Easement Act and whether the findings of courts below that it is a right of easement by grant is sustainable.

2)Whether the right of way provided under Ext.A1 is extinguished by formation of an alternative way available to respondents.

6. Learned counsel appearing for the appellant and respondents were heard.

7. Ext.C2(a) sketch with Ext.C1 report establish the lie of the properties. Kannur National Highway runs north-south through the western side of the property of appellant and respondents. A panchayat road starts from the said National Highway and runs towards the east through the northern boundary of the property of appellant and a portion of the property of respondents. Plaint schedule property belonging to appellant is B schedule to Ext.A1 partition deed. The property which lies to its west is item No.1 of A schedule property under Ext.A1. Ext.A1 specifically provide that a way is available to item No.1 of A schedule property towards the west through B schedule property. It also provides that the allottee of A

schedule property is entitled to use that way. The question is whether the said right of way provided under Ext.A1 is a right of easement by necessity or by grant.

8. Though learned counsel appearing for appellant argued that it is only a right of easement by necessity, as rightly found by courts below, it can only be a right of easement by grant. When Ext.A1 provides that the person to whom A schedule property is allotted is entitled to use that way through B schedule property, it can only be a right of easement by grant. If that be so, the availability of an alternative way later will not cause extinguishment of the said right. Only if it is a right of easement by necessity as provided under Section 13(b) of the Indian Easement Act, the right of way will be extinguished as provided under Section 41 of the Indian Easement Act. When the right of way provided under Ext.A1 is the right of easement by grant, Section 41 has no application. A right of way by easement of grant can be extinguished only by a revocation as provided under Section 39 of the Indian Easement Act. Appellant has no case that respondents have revoked the right of way granted under Ext.A1. Therefore on the ground that subsequently a Panchayat road was formed, through the northern boundary of

the property of respondents, appellant is not entitled to contend that the right of way by grant provided under Ext.A1 is extinguished. Hence courts below rightly dismissed the suit.

9. Learned counsel appearing for appellant then submitted that the lie of the way provided under Ext.A1 and noted by the Commissioner in Ext.C2 sketch may be changed to the northern end of the property so that there will be no nuisance for the enjoyment of plaint schedule property. Learned counsel appearing for respondents submitted that the way is provided so that the sharer to whom A schedule property is allotted, could enjoy the property and in fact the family house is in item No.1 of A schedule property and the said way is used as part of the religious custom, for the entry of a procession from the temple to the family house and therefore respondents are not prepared to change the lie of the way. When a right of easement by grant is provided under Ext.A1 and is available to the respondents, without their consent the way cannot be changed. Hence appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-